No. 12511.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

HOME LOAN BANK BOARD, WILLIAM K. DIVERS, O. K. LAROQUE, J. ALSTON ADAMS, FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, FEDERAL HOME LOAN BANK OF SAN FRANCISCO, JOHN H. FAHEY, A. V. AMMANN and GEORGE K. BRAMLEY,

Appellants,

vs.

PAUL MALLONEE, *et al.*,

Appellees.

FEDERAL HOME LOAN BANK OF SAN FRANCISCO, *et al.*,

Appellants,

vs.

FEDERAL HOME LOAN BANK OF LOS ANGELES, *et al.*,

Appellees.

Brief of Appellees, Federal Home Loan Bank of Los Angeles and Certain of Its Member Associations and Appendix.

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Appellees.

Brief of Appellees, Federal Home Loan Bank of Los Angeles and Certain of Its Member Associations.

This brief is written for and on behalf of appellees Federal Home Loan Bank of Los Angeles (hereinafter sometimes referred to as "Los Angeles Bank") and five of its member associations, namely, Coast Federal Savings & Loan Association, Standard Federal Savings & Loan Association, Central Building & Loan Association, State Savings & Loan Association and Los Angeles American Savings & Loan Association, the latter suing both in their own respective rights as member associations of the Los Angeles Bank and as virtual representatives of all other

member associations similarly situated other than Long Beach Federal Savings & Loan Association and First Federal Savings & Loan Association of Wilmington, which latter two associations are represented in these proceedings and in the consolidated actions below by separate counsel. The Los Angeles Bank is one of the plaintiffs in Action No. 5678-PH (the so-called Los Angeles action) below and is a cross-claimant[1] in the so-called Mallonee action (No. 5441-PH). The five member associations above mentioned are plaintiffs in the Los Angeles action.

Jurisdictional Statement.

Appellants' brief recognizes the fact that the jurisdiction of the District Court to hear and determine the consolidated actions below springs from two separate sources, since at the outset the Mallonee case and the Los Angeles case were each filed as independent actions.

In order to avoid duplication as regards points to be presented by other appellees, this brief will treat primarily of the jurisdiction of the District Court over the Los Angeles case, although of course several of the points presented will have equal application to the Mallonee action. This is particularly true as to what will be said herein with reference to the jurisdiction *in rem*[2] or *quasi-in rem* of the District Court over assets and properties in California under 28 U. S. C., Section 1655 (formerly Judicial

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[1]The allegations of the cross-claim of Los Angeles Bank in the Mallonee action are identical with those set forth in the first count of the complaint in the Los Angeles case. The second count of the complaint in the Los Angeles action sets forth the claims of the five member associations.

[2]Appellants agree (Brief p. 9) that *both* of the consolidated actions were designated as *in rem* actions.

Code, Sec. 57[3], 28 U. S. C., Sec. 118), and with reference to the jurisdiction *in personam* of the District Court over defendants found in California (such as the so-called Federal Home Loan Bank of San Francisco, hereinafter called "San Francisco Bank," which is in actual possession of the assets and properties constituting the *res* below).

The complaint in the Los Angeles action accurately described its nature as being a "Complaint to enforce legal and equitable claims to, to obtain possession of and to remove liens from and clouds upon title to, property and for other and general relief." [20 R. 9455-6.][4] Jurisdiction was invoked under old Section 57 of the Judicial Code (then 28 U. S. C., Sec. 118, now 28 U. S. C., Sec. 1655) and under Sections 3, 12, 17, 25 and 26 of the Federal Home Loan Bank Act (July 22, 1932, 47 Stat. 725 *et seq.*, 12 U. S. C., Secs. 1421-1499); and the complaint alleged in terms that the activities complained of had operated to deprive these appellees of their property without due process of law, to cast a cloud upon their title and other interests as to such property, and that the claims of the defendants with reference thereto were wholly without right. [20 R. 9466, 9476, 9485, 9491-3.] It was also alleged that the matter in controversy exceeded, exclusive of interest and costs, the sum of $45,000,000 as to the first (Los Angeles Bank) count and the sum of $14,000,000 as to the second (the five member associations) count. [20 R. 9466, 9485-6.] The prayer was in the conventional form of an action *quasi-in rem* to remove a cloud on title, to quiet title and to regain possession. [20 R. 9493-96.]

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[3]Judicial Code, Section 57 is set forth in the Appendix hereto.

[4]Denoting Vol. XX of the printed record, pages 9455 and 9456.

We shall of course, have occasion herein to discuss more fully the basis of the jurisdiction below. As to the jurisdiction here, the appeal is taken under 28 U. S. C., Section 1292 (1). The primary question here, so far as these appellees are concerned, relates not so much to the jurisdiction of this Court, *as to the scope of the review.* We say this for the reason that at page 109 of appellants' brief, we find the following candid statement:

> "It is too clear for argument that the subject matter for hearing[5] under the Board order of September 9, 1949, bears no relation to the subject matter of the Los Angeles action. The Board order relates only to the affairs of the Long Beach Association, while the Los Angeles action is concerned exclusively with the validity of the orders of March 29, 1946, consolidating the reserve banks of the former Eleventh and Twelfth Districts."

These appellees agree without reservation that the board order and the injunctive order appealed from relate wholly to the affairs of the *Long Beach* Association; and we shall later press the point herein that any questions raised on this appeal, with reference to the basic jurisdiction of the Disrtict Court to hear and determine the *Los Angeles case,* are wholly irrelevant to the question actually presented on this appeal which is: Did or did not the District Court err, whether for want of power or otherwise, in granting an injunction which related only to the subject matter of the *Mallonee,* or Long Beach, case?

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[5]This being, of course, the administrative hearing referred to in the injunction appealed from.

Statement of the Case.

The complaint in the Los Angeles case sets forth in substance the following facts:

On March 29, 1946, the Los Angeles Bank was the owner or, in the alternative, the lawful holder and entitled to the possession of over $45,000,000 of value in assets and properties.[6] [20 R. 9469.] It held some $14,000,000 in value of securities pledged or deposited with it for safekeeping by its member associations including the five appellee associations earlier mentioned herein. [20 R. 9485-6.] All of these assets and properties were in the State of California. [20 R. 9469.] It was being efficiently and economically operated and its affairs were in a healthy and prosperous condition. [20 R. 9476.]

2. On said date of March 29, 1946, defendant John H. Fahey, then acting as Federal Home Loan Bank Commissioner (since succeeded by appellant Home Loan Bank Board), without prior notice, hearing, or opportunity to be heard, arbitrarily and unlawfully seized the Los Angeles Bank and its assets, turned out its officers and purported to do each of the things specified in his purported orders Nos. 5082, 5083 and 5084 [20 R. 9470-74], which orders provided in substance as follows:

a. *Order No. 5082:* Los Angeles Bank was to be liquidated and reorganized; its assets and properties were "hereby" transferred to the Portland Bank; the liabilities of the Los Angeles Bank were to be assumed by and were "hereby declared to be" liabilities of the Portland Bank; the president of the Portland Bank was authorized to sign

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[6]This fact is *affirmatively alleged* in the answer of the San Francisco Bank. [9 R. 4060.]

documents in behalf of Los Angeles Bank; the members of the Los Angeles Bank were to become members of the Portland Bank; the Portland Bank was to be moved to San Francisco and to be hereafter known as the San Francisco Bank; the Portland Bank officers, directors, etc., were to act as such for the San Francisco Bank for the calendar year 1946 and the Portland charter was to govern the San Francisco Bank until "changed"; the San Francisco Bank was to operate branches at Portland and Los Angeles; (then followed further provisions for replacement of officers and directors, etc.).

b. *Order No. 5083:* The District of the Portland Bank was readjusted to include Arizona, California, Nevada and Hawaii; the Portland Bank was moved to San Francisco and was henceforth to be known as the San Francisco Bank.

c. *Order No. 5084:* The Los Angeles Bank was dissolved.

3. Orders Nos. 5082, 5083 and 5084 were published in the Federal Register; as a result of such orders, which defendants assert to be valid, defendants claim Portland Bank to be the owner and entitled to the possession of the seized assets, which claim is wholly without right. [20 R. 9475-6.]

4. Said orders and the things done under them operated to deprive Los Angeles Bank of its property without due process of law, constituted a trespass and a fraud in law upon its constitutional rights, and cast a cloud upon its rights, titles and interests as to the assets and properties in question. [20 R. 9476.]

[The complaint then went on to charge in detail that the Commissioner's purported determination as to the necessity of seizing the Los Angeles Bank was untrue, sham and false and that in reality the seizure was the punitive culmination of a series of acts whereby the Commissioner had arbitrarily attempted to dominate the affairs of the Los Angeles Bank and to dictate to it as to who should fill an existing vacancy in its presidency: 24 R. 9480-85.]

Since the case has not been tried, the scope of the controversy must be measured by the claims set forth in the complaint. In this connection, it is worthy of note to point out that the answer of the San Francisco Bank admits that it claims the disputed assets solely under and by virtue of the three administrative orders above referred to; in other words, the sole muniments of title upon which its relies in this action *quasi-in rem* to quiet title, to remove clouds on title and to regain possession, are these three administrative orders. [9 R. 4058, 4060-61, 4062-63, 4064-65, 4066, 4071, 4078-79, 4088.]

On the merits then, the fundamental question below concerns the basic power of a court in equity, in an action *quasi-in rem,* to adjudicate property rights as against a claim that the administrative nature of the acts underlying the controversy preclude the exercise of its historical jurisdiction in this regard. And it should also be borne in mind that in this action *quasi-in rem* the District Court also has jurisidiction *in personam* over the party actually in possession of the *res;* namely, the San Francisco Bank which, as we have seen, openly concedes that at all times down to March 29, 1946, the Los Angeles Bank was either the owner or in any event entitled to the possession of the properties and assets in dispute. This means, as we shall later point out, that any decree which might be rendered

directing a return of these properties and assets would be directly operative—*would expend itself completely,* as the cases say—upon the San Francisco Bank without requiring any action whatever by the Home Loan Bank Board.

Questions Involved.

In addition to the questions posed by appellants at pages 21 and 22 of their brief, these appellees suggest the following:

1. Since it is conceded that the subject matter of the enjoined administrative hearing bears no relation to the subject matter of the Los Angeles action, does it not necessarily follow that any questions with reference to the jurisdiction of the District Court over that action are moot and irrelevant insofar as this appeal is concerned?

2. In view of such concession, does it not follow that in presenting the questions as to the jurisdiction of the District Court over the Los Angeles action, appellants are in reality asking this Court to render a purely advisory opinion as to a matter irrelevant to the subject matter of the present appeal and hence unnecessary to any decision to be rendered on the present appeal?

Summary of the Argument.

1. The contentions of appellants with reference to asserted lack of jurisdiction over the subject matter of the Los Angeles action present questions which are wholly moot and irrelevant to the merits of the present appeal and hence are not necessary to any decision which may be rendered herein.

2. The Los Angeles action is neither an action to enforce the charter of the Los Angeles Bank nor is it an action brought to review the actions of the commissioner evidenced by his Orders Nos. 5082, 5083 and 5084. It is, on the contrary, a plenary equity action *in rem* or *quasi-in rem* brought under former Judicial Code Section 57, in which the effect of the orders above referred to is drawn in question purely as an incident to the District Court's inquiry into title, ownership and the right to possession of the assets and properties constituting the *res* before the Court. In addition to this, and as an incident to its basic jurisdiction *in rem,* the Court has acquired jurisdiction *in personam* of the San Francisco Bank, the party in actual possession of the assets and properties in dispute.

3. The activities of the commissioner leading up to the seizure of the demanded assets and properties are subject to judicial scrutiny.

4. The contention of appellants that neither the Los Angeles Bank nor its member associations have any standing to question the validity of the orders of March 29, 1946, is devoid of merit.

5. The contention of appellants that the Home Loan Bank Board and its members are indispensable parties is devoid of merit.

6. The orders of March 29, 1946, are not valid on their face, nor are they immune from attack by a showing, *dehors* the orders themselves, that the seizure was unlawful, arbitrary and punitive in its nature.

7. The injunctive order appealed from was a proper exercise of the Court's equity powers in protecting its jurisdiction.

ARGUMENT.

I.

The Contentions of Appellants With Reference to Asserted Lack of Jurisdiction Over the Subject Matter of the Los Angeles Action Present Questions Which Are Wholly Moot and Irrelevant to the Merits of the Present Appeal and Hence Are Not Necessary to Any Decision Which May Be Rendered Herein.

This appeal has been taken solely from the order of the District Court enjoining the holding of an administrative hearing, in Washington, as to the affairs of Long Beach Federal Savings & Loan Association. The question on the merits is whether the District Court was right or wrong in granting the injunctive order appealed from. As we have seen, at page 109 of their brief, appellants openly state that "It is too clear for argument that *the subject matter for hearing under the Board order of September 9, 1949, bears no relation to the subject matter of the Los Angeles action. The Board order relates only to the affairs of the Long Beach Association, while the Los Angeles action is concerned exclusively with the validity of the orders of March 29, 1946*[7] . . ."

It is therefore manifest that the order appealed from presents *no question whatever concerning the jurisdiction of the District Court over the action brought by the Federal Home Loan Bank of Los Angeles and its member*

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[7]Emphasis here, as elsewhere, is supplied unless otherwise noted.

stockholders to regain possession of the property and assets summarily seized from them. Therefore, under familiar rules of appellate practice, the question of the jurisdiction (or any asserted lack thereof) of the District Court over the *Los Angeles* action is wholly unnecessary to any decision which may be rendered on this appeal.

Reflection will show that this must be so. Whether the District Court does or does not have jurisdiction to hear and determine the claims of the Los Angeles Bank to a return of its seized assets is obviously and utterly irrelevant to the question of the power (or asserted lack thereof) of the District Court to enjoin the holding of a proposed administrative hearing which *"relates only to the affairs of the Long Beach Association";* which latter question is the one to be decided upon this appeal. Jurisdiction or the lack thereof over the affairs of the Los Angeles Bank, in other words, should neither add to nor detract from the judicial power to grant an injunction in aid of the District Court's jurisdiction (springing from the *Mallonee* case) over the affairs of the Long Beach Association. Nor does the fact of consolidation of the two actions in any way alter this result; for the jurisdiction of the consolidated actions, as appellants' brief recognizes throughout, is but the sum of the respective jurisdictions, separately invoked, of the two independently filed actions.

The result is that in asking this Court to pass upon the question of jurisdiction over the Los Angeles action, appellants are necessarily requesting this Court to render an advisory opinion upon a question not only unnecessary to,

but wholly irrelevant, both in fact and on appellants' own theory, to the question actually presented for decision: *Whether the District Court was right or wrong in granting an injunction relating wholly to the affairs of the Long Beach Association.* Federal appellate courts do not write advisory opinions, *Muskrat v. U. S.,* 219 U. S. 346, 351 *et seq.; Alabama State Federation of Labor v. McAdory,* 325 U. S. 450, 461, nor do they pass upon questions which are not necessary to the decision of the questions actually involved. *Gibbes v. Zimmerman,* 290 U. S. 326, 333; *Lewis Publishing Co. v. Wyman,* 228 U. S. 610, 615; *Glasgow v. Baker,* 128 U. S. 560, 577-8; *Thompson v. Terminal Shares,* 8 Cir., 89 F. 2d 657.

For these reasons it is respectfully suggested that a consideration of each and all of the points presented under appellants' Point II, covering pages 88-106 of their brief and all dealing with the Los Angeles Bank seizure of March 29, 1946, is unnecessary to the decision herein. At the same time, we desire to make it abundantly clear that we are by no means reluctant to meet appellants on their own ground so far as the jurisdiction underlying the Los Angeles Bank litigation is concerned; and we therefore turn now to a consideration of that question, whether it be germane or not to the present appeal.

II.

The Los Angeles Action Is Neither an Action to Enforce the Charter of the Los Angeles Bank nor Is It an Action Brought to Review the Actions of the Commissioner Evidenced by His Orders Nos. 5082, 5083 and 5084. It Is, on the Contrary, a Plenary Equity Action in Rem or Quasi-in Rem Brought Under Former Judicial Code, Section 57, in Which the Effect of the Orders Above Referred to Is Drawn in Question Purely as an Incident to the District Court's Inquiry Into Title, Ownership and the Right to Possession of the Assets and Properties Constituting the Res Before the Court. In Addition to This, and as an Incident to Its Basic Jurisdiction in Rem, the Court has Acquired Jurisdiction in Personam of the San Francisco Bank, the Party in Actual Possession of the Assets and Properties in Dispute.

Appellants' twin theses: that the Los Angeles action is an action to enforce the charter of that institution and that it is brought to "review" the Commissioner's actions culminating in the seizure of the Los Angeles Bank's assets pursuant to Orders Nos. 5082, 5083 and 5084, exhibit nothing more than a studious attempt to misunderstand the true nature of the action.

A reading of the complaint makes it perfectly obvious that all of the elements of the conventional cause of action in equity by an owner out of possession to quiet title, to remove a cloud on title and to regain possession are present. Ownership and right to possession in the Los Angeles Bank down to March 29, 1946, deprivation of possession as of that date, an adverse claim under color of title (evidenced by the three orders as published in the Federal Register), plus the customary allegation that such claim is wholly without right, are all set forth.

So viewed, and correctly viewed, the Los Angeles complaint is open to neither of the interpretations which appellants seek to put upon it. The action is purely and simply an equitable action *quasi-in rem* to try title as between one who alleges itself to be an owner out of possession—the Los Angeles Bank—and one who alleges itself to be an owner in possession—the San Francisco Bank. The latter claims, as its sole muniment of title, the three administrative orders of March 29, 1946, and particularly Order No. 5082, the purported instrument of transfer. The question presented, therefore, is whether or not the orders in question did or did not operate to pass title to the disputed assets and properties; a question which is present, generally as regards a deed or other instrument under which the defendant claims, in any quiet title suit or action to remove a cloud on title.

This is certainly a question which the District Court has jurisdiction to determine, whether its ultimate decision be right or wrong. And the decision of this question calls for no species of *review* of the administrative orders, in the sense in which appellants use the term. The question is, not whether the orders should be set aside, in the administrative sense, but whether they, and particularly Order No. 5082, operated to transfer title to the San Francisco Bank. It is the contention of the latter that the orders did have this effect. It is the contention of the Los Angeles Bank that they did not; that from the standpoint of legal title the orders had no more effect than would a wild deed, executed in favor of the San Francisco Bank by a third party (here the Commissioner) not connected with the title. These are questions for the District Court to determine, along with the other questions which appellants raise on this appeal, and none of which go to the *jurisdiction* of the District Court. *All* of these

questions go to the merits of the key question below, which is: Did or did not the orders in question pass title to the demanded assets and properties? And it is certainly a novel experience to the writers of this brief that an appellate court should be asked to decide this question in advance of a trial on the merits.

Appellants seem to lay stress upon the fact that the prayer in the Los Angeles complaint asks that the orders in question be declared to be null and void and that any clouds or liens created thereby be removed. This is no more than would be prayed as to any wild deed or other instrument clouding or otherwise affecting a valid title. It certainly does not call for a setting aside of the orders as in the case of an administrative review.

However, and in any event, and without expressing any further opinion upon the subject, if it should appear that such relief as prayed goes too far, it is nevertheless obvious that this particular objection relates merely to the form of the decree to be rendered. The District Court, having jurisdiction *in personam* over the San Francisco Bank, has plenary power to adjudicate the San Francisco Bank a constructive trustee and order it to return the demanded assets and properties without in any way touching the orders in question. Such action would clearly be within the powers of a court of equity, in a proceeding *quas-in rem*. (*Title Insurance and Trust Co. v. California Development Co.*, 171 Cal. 173, 198-199.) Such relief *in personam* would be purely in aid of and incidental to the exercise of the court's jurisdiction *in rem* over the assets and properties themselves.

Jellenik v. Huron Copper Mining Co., 177 U. S. 1;
Harvey v. Harvey (7 Cir.), 290 Fed. 653.

The true nature of the incidental powers of the court in an action of this type is excellently set forth in *Harvey v. Harvey, supra,* where the court said:

> "Appellant's contention that the injunction granted relief *in personam* and therefore cannot be based upon service under Section 57, which applies to actions *in rem,* is not well founded. This suit is in the nature of a suit to quiet title to personal property within jurisdiction of the court. The court has in its custody the *res.* It puts out its protecting hand and says to the defendants that the plaintiff claims the *res;* that pending the determination of that claim the *statu quo* shall be maintained and the defendants restrained from using the *res;* that if they desire to contest the claim of the plaintiff to this property they shall come into court and do so. Incidental to its jurisdiction over the *res,* the court may use its power of injunction not to prevent distinctly personal acts by the defendants disconnected with the *res,* but to prevent the defendants interfering with, disposing of, converting, injuring, or wrongfully using the *res.*" (290 Fed. at p. 659.)

Therefore, the orders of March 29, 1946, are involved in the Los Angeles Action only as an incident to a determination, by a court of equity having jurisdiction over a specific *res,* of title and right to possession of that *res.* Since both of appellants' premises as to the nature of the action are false, it therefore follows that their conclusions in this regard are also false. At the same time, we cannot permit appellants' assertions as to their judicial untouchability to pass unchallenged.

III.

The Activities of the Commissioner Leading Up to the Seizure of the Demanded Assets and Properties Are Subject to Judicial Scrutiny.

Section 26 of the Federal Home Loan Bank Act, as amended, 12 U. S. C., Sec. 1446, under which the Commissioner purported to act in seizing the demanded assets, confers a power and prescribes a procedure for the liquidation or reorganization of a federal home loan bank. Among other things, the Commissioner (the Commissioner succeeded to the powers of the Federal Home Loan Bank Board under Executive Order No. 9070) must make a finding; and he must also pay off and retire the outstanding stock of the bank, in whole or in part. Appellants argue that as a matter of statutory construction, the court should imply from the Act that the Commissioner was given final and absolute discretion in dissolving and reorganizing a bank, without any right of judicial review whatever. Granting the power to liquidate *or* reorganize, the procedure therefor is set forth in the statute and must be followed. (*Ohio Bell Telephone Co. v. Public Utilities Comn,* 301 U. S. 292, 304.) This process expressly included paying off and retiring the stock of the bank in whole or in part. This process, the Los Angeles complaint alleges (and we do not understand the fact to be disputed), was not followed here. And it is as true of the Commissioner as of any other administrative agency that where, as here, a particular mode of exercising a power is conferred by law, *the mode is the measure of the power.* (*Reams v. Cooley,* 171 Cal. 150; *Cowell Lime & Cement Co. v. Williams,* 182 Cal. 691.) The question of whether the Commissioner did or did not exercise his power in the mode prescribed is of course

a *judicial* question; which of course means a question reviewable by a *court*.

Section 26 also requires a *finding* of efficiency and economy in the accomplishment of the purposes of the Act. The Commissioner here made no *finding* whatever. He did make a purported *determination* that the efficient and economical accomplishment of the purposes of the Act would be aided by his contemplated action. (Order No. 5082.) It is obvious that a *finding,* as required by the statute, imports a hearing, based upon evidence, before any "determination" or other decision may be arrived at. A "finding" of the existence of certain facts presupposes some hearing of evidence tending to prove such facts.

> *Abrahms v. Daugherty,* 60 Cal. App. 297, 302;
>
> *California Employment Comm'r v. Malm,* 59 Cal. App. 2d 322, 324;
>
> *Mt. Carmel Public Utility & Service Co. v. Public Utilities Comm'r* (Ill.), 130 N. E. 693, 696.

The fact that the Commissioner purported to make a "determination" rather than the finding which the statute prescribes is in itself persuasive evidence that he was unable to find, *from evidence,* any *facts* which would have supported his determination; and, of course, it is not open to dispute that the Commissioner acted without affording the Los Angeles Bank or its members any notice or hearing whatever. But again, the question of whether the Commissioner did or did not make a finding and, if so, whether such finding was supported by evidence, are *judicial* questions, as is the further question, tendered by the Los Angeles complaint, that the Portland Bank did

not *acquire* the assets of the Los Angeles Bank, with the approval of the Board, as the Act provides, but that instead the Los Angeles assets were thrust upon the Portland Bank by the Commissioner without any affirmative corporate action whatever by either bank.

Furthermore, under general principles of jurisprudence the right of appeal to the courts in the case of administrative action of an arbitrary or capricious nature which, as here, directly affects property rights is established. (*Markall v. Bowles,* 58 Fed. Supp. 463 (D. C., N. D., Cal.).) Under such circumstances Federal courts will read the requirements of due process into the Act, and due process means a hearing; therefore, a hearing is an integral part of the Federal Home Loan Bank Act, just as much as if the Act itself in words stated that a hearing should be held. (*Cf. Eisler v. Clark,* 77 Fed. Supp. 610 (D. C., D. C.), *cert. denied,* 338 U. S. 879.) In many cases it has been held that where discretion is conferred on an administrative officer to render a decision, this decision must be honestly rendered, and if it is arbitrary or capricious, or rendered in bad faith, the courts have power to review it and set it aside.

Gadsden v. United States, 78 Fed. Supp. 126 (Ct. Claims).

See further:

Southern Railway Co. v. Virginia, 290 U. S. 190, 194 *et seq.;*

Londoner v. Denver, 210 U. S. 373, 386;

Standard Airlines v. Civil Aeronautics Board, 177 F. 2d 18, 20 (D. C. Cir.);

Stark v. Brannan, 82 Fed. Supp. 614, 617 (D. C., D. C.).

The test seems to be this: That if an administrative agency merely *advises,* a hearing in the due process sense may not necessarily be required; but where, as here, the agency *ordains,* in such a manner as to impinge upon property rights, a due process (which means a *full and fair*) hearing is required at the administrative level in order to facilitate attendant judicial review.

Norwegian Nitrogen Products Co. v. U. S., 288 U. S. 294, 318-319;

Morgan v. U. S., 304 U. S. 1;

I. C. C. v. L. & N. R. Co., 227 U. S. 88;

Ohio Bell Telephone Co. v. Public Utilities Com., 301 U. S. 292.

There can certainly be no question here but that the Commissioner *ordained* here. He ordained that $45,000,000 of assets lawfully owned or possessed by the Los Angeles Bank should, by mere official *fiat,* be transferred to the Portland Bank. That his ordainment impinged upon the property rights of both the Los Angeles Bank and its depositor or pledgor members is self-evident. Under these circumstances, appellants' argument, that neither the bank nor its members' property rights were affected by the seizure, wholly fails to stand scrutiny.

The basic principle is that due process requirements are satisfied *if, and only if, at any time before governmental action with reference to property rights becomes final, hearings are allowed either by administrative or by judicial action.* Davis, "The Requirement of Opportunity to be Heard in the Administrative Process," 51 Yale Law Journal 1093, 1136 (1942). It is conceded that the Los Angeles Bank received no hearing at the administrative level. It is therefore entitled to it *now,* when the matter is pending before a *court.* Otherwise, it is respectfully submitted, the plain mandate of the Fifth Amendment will have been violated. This means that the District Court is empowered, as a matter of due process of law, to scrutinize the activities of the Commissioner here complained of, in addition to its plenary jurisdiction in equity to adjudicate title and the right to possession to the assets and properties over which it has acquired jurisdiction.

What has been said above should dispose of the contention that the findings (if any) of the Commissioner are not subject to judicial review. Such a plea in the face of the charge of arbitrary action directly affecting the property rights of the plaintiffs in the Los Angeles action simply cannot be justified. And this is particularly true where, as in the pattern of the Federal Home Loan Bank Act, no administrative review is provided. This merely means, in the eyes of equity, that no adequate remedy at law has been provided for the protection of the property rights of those plaintiffs against arbitrary action; in itself, a valid ground of equity jurisdiction.

IV.

The Contention of Appellants That Neither the Los Angeles Bank nor Its Member Associations Have Any Standing to Question the Validity of the Orders of March 29, 1946, Is Devoid of Merit.

The contention of appellants in this regard seems to be predicated upon the theory, already commented upon herein, that the seizure of March 29, 1946, affected neither the property rights of these appellees nor their rights to be protected against tortious invasion. In the light of the allegations of the Los Angeles complaint, to state appellants' contention is to answer it. As we have seen, the complaint directly charges a tortious invasion of the property rights both of the Los Angeles Bank (rights of a value of $45,000,000), and of its member associations (rights valued at $14,000,000). Whether there was such an invasion and whether the same was tortious, were and are questions for the District Court to determine in the exercise of its jurisdiction to try title to the demanded assets. The charge was and is *conversion* as to personal property and *trespass* as to realty; it is respectfully urged that an assertedly sacrosanct administrative agent has no more right to commit torts of this nature, under color of official rectitude, than any other person.

The plain fact is that irrespective of how or for what reason the Los Angeles Bank was created, as soon as it acquired *property* in the course of its operations, it could only be deprived of that property through procedures which satisfy the requirements of due process of law. Compare *In re Carter,* D. C., Cir., 177 F. 2d 75, 77-8.

As for the purported "dissolution" of the Los Angeles Bank, this is, of course, but part and parcel of the arbitrary attempt to denude it of its properties. Even the orders of March 29, 1946, recognize that before a Federal Home Loan Bank may be "dissolved," some attempt must be made (a) to dispose of its assets, and (b) to take care of its stockholders. Here the charge is that *neither* of these conditions precedent were lawfully carried out. The entire procedure embodied in the three orders is, therefore, subject to judicial scrutiny in the Los Angeles action in the course of trying title to the seized assets.

It is subject to examination in two aspects: (1) in the right of the Los Angeles Bank itself, and (2) in the right of appellee member associations.

And it is not to be overlooked that it is the latter to whom, even in the impossible event of a valid dissolution without a proper disposition of the Bank's assets, would descend the right of recovering those assets or, in the alternative, protecting them from spoliation. Appellants could not, therefore, avoid a judicial review of the activities of March 29, 1946, on any specious plea that the Los Angeles Bank no longer exists as a corporate entity; a plea which, to the credit of appellants, they do not stress, and which. if they did stress it, would merely point up the fact that in any event the District Court has jurisdiction to try title to the seized assets at suit of the member associations.

V.

The Contention of Appellants That the Home Loan Bank Board and Its Members Are Indispensable Parties Is Devoid of Merit.

Here again we find appellants ignoring the true nature of the Los Angeles action. It is Hornbook law that where a court has jurisdiction *in rem* or *quasi-in rem,* the principal function of the process of the court is to apprise parties having or claiming an interest in the *res* of the controversy in reference thereto, in order that they may appear, *if they so desire,* and protect their interests. And, under the pattern of old Judicial Code, Section 57 (28 U. S. C., Sec. 1655), absent defendants may be served by substituted process, which was here done in the case of Commissioner Fahey. Upon service thus being made, Commissioner Fahey had the right to appear or not, as he chose. He appeared by various motions, attacking jurisdiction both of the subject matter and over his person. His successor, the Home Loan Bank Board, has heretofore answered as to the merits while at the same time attempting to preserve the jurisdictional points.

For the purposes of jurisdiction of the District Court over the Los Angeles case, it is manifestly of no moment whether Fahey or the Board actually appeared or not. 28 U. S. C., Section 1655 provides (as did Judicial Code, Section 57 before it) that where the absent defendant does not, after substituted service, appear, the adjudication shall, as to him, "affect only the property which is the subject of the action."

It is only such a decree—one affecting only the property which is the subject of the action—which is sought in the Los Angeles action. The prayer is that the assets

and properties be recovered, that title in appellees be quieted and confirmed, and that any cloud occasioned by the three orders be removed.

In other words, so far as Commissioner Fahey and his present successor are concerned, the jurisdiction of the District Court to adjudicate title and right to possession of the demanded properties and assets attached at the moment service was made upon the late Commissioner. *Whether he was an indispensable party to this controversy or whether he was not, the District Court obtained jurisdiction then and there to adjudicate his claims, if any, with reference to the assets.*

Repeated decisions of the Supreme Court indicate, however, that neither Fahey nor the Home Loan Bank Board were or are indispensable parties to this controversy over title and right to possession of the seized Los Angeles Bank assets. The test, as laid down by the Supreme Court is whether or not the decree may be said to be capable of expending itself against the subordinate of the governmental agency involved; here, of course, the San Francisco Bank.

In *Williams v. Fanning,* 332 U. S. 490, the court held that the Postmaster General was not an indispensable party in an action brought to enjoin the local Postmaster from carrying out a postal fraud order issued by the Postmaster General after a hearing. The court cited authority for the proposition that a superior officer is an indispensable party if the decree granting the relief sought would require him to take action, either by exercising directly a power lodged in him or by having a subordinate exercise it for him. It was held that the Postmaster General was not indispensable because the decree entered would

effectively grant the relief desired *by expending itself on the subordinate official* who was before the court.

> "The decree in order to be effective need not require the Postmaster General to do a single thing—he need not be required to take new action either directly as in the *Smith* and *Fall* cases or indirectly through his subordinate as in the *Rutger* case. No concurrence on his part is necessary to make lawful the payment of the money orders and the release of the mail unstamped. Yet that is all the court is asked to command." (P. 494.)

Similarly, in the present case, the decree will effectively grant the relief desired by expending itself on the San Francisco Bank, which is before the court and is in actual possession of the disputed assets. All that the court is asked to command is the reconveyance of the property and assets wrongfully and arbitrarily seized from the plaintiffs, accounting with reference to said assets and properties, and the quieting of title to the assets and properties in the plaintiffs. None of this requires concurrence on the part of the Federal Home Loan Bank Board or any other non-resident defendant. The decree in order to be effective need not require the Board to do a single thing, either directly or indirectly.

Further illustrating that the Federal Home Loan Bank Board is not an indispensable party to this action are the following: *Hynes v. Grimes Packing Co.*, 337 U. S. 86, 96 (Secretary of the Interior not an indispensable party to a suit to enjoin the exclusion of commercial fishermen from shore line waters designated as an Indian Reservation by the Secretary, on the ground of the invalidity of the Secretary's order and regulation); *Jeager v. Simrany*, 9 Cir., 180 F. 2d 650, 651 (Commissioner of Immigra-

tion not an indispensable party to a suit for declaratory judgment and injunction against a local immigration officer, to prevent him from proceeding to cancel the record of registry and a certificate of lawful entry of an alien); *Rank v. Krug* (D. C. S. D., Cal.), 90 Fed. Supp. 773, 802 (Secretary of the Interior and the United States not indispensable parties to a class suit to enjoin interference with plaintiff's water rights by reason of erection of dam under Federal Reclamation Laws); *Reeber v. Rossell* (D. C. N. Y.), 91 Few. Supp. 108, 111 (Administrator of Veterans Affairs and Chairman of Civil Service Commission not indispensable parties in an action for declaratory judgment that the Administrator's order was null and void as against the plaintiffs); *National Radio School v. Marlin* (D. C., Ohio), 83 Fed. Supp. 169, 170 (Administrator of Veterans Affairs not indispensable party to suit to enjoin local veterans' finance officer and others from withholding issuance of vouchers for veterans' tuition). The Court of Appeals for the Sixth Circuit expressed the guiding principles in *Varney v. Warehime,* 147 F. 2d 238, as follows:

> "Matters of convenience and necessity are entitled to consideration. Citizens should not be compelled to seek a distant forum for litigation of their controversies with the Government, and likewise, public officials should not be compelled to neglect their duties to answer charges of usurpation of power in a distant forum.
>
> "Approaching the subject from a practicable standpoint, we need not overlook the fact that the question of constitutionality or statutory power of a pub-

> lic official is usually a question of law, and may be determined in any appropriate forum without the personal presence of the superior government official.
>
> "The right of intervention is available to a superior official in any suit where his subordinate is made a party defendant. Governmental regulations under present circumstances are so widespread and affect such a vast number of our people that those who in good faith believe a public official is proceeding beyond his jurisdiction should be permitted to litigate the question if the officer before the court is such an agent in the matter involved that it is reasonable to proceed to an adjudication of the issue with finality."

It therefore follows that neither Fahey nor the Federal Home Loan Bank Board were or are indispensable parties to this action; but in any event, as we have pointed out, the jurisdiction of the District Court to adjudicate title and the right to possession of these assets under Section 57 of the Judicial Code, as far as Fahey or the Board were or are concerned, attached immediately when substituted service on Fahey was completed, whether he was an indispensable party or not. Compare *Jellenik v. Huron Copper Mining Co.*, 177 U. S. 1; *Harvey v. Harvey*, 7 Cir., 290 Fed. 653; *McRoberts v. Independent Coal & Coke Co.*, 8 Cir., 15 F. 2d 157.

What we have said above also answers appellants' kindred contention that the Los Angeles suit is an action against the United States. It is no more such than was *Williams v. Fanning* or the other cases cited above to show that neither Fahey nor the Board were or are indispensable parties.

VI.

The Orders of March 29, 1946, Are Not Valid on Their Face, nor Are They Immune From Attack by a Showing, Dehors the Orders Themselves, That the Seizure Was Unlawful, Arbitrary and Punitive in Its Nature.

It is claimed by appellants that the orders of March 29, 1946, were valid on their face. With all due respect, the exact converse is true.

It is to be borne in mind that it is conceded that as of March 29, 1946, the Los Angeles Bank was the undoubted owner or depositary or pledgee (and in all events entitled to the possession) of some $45,000,000 in assets. It should also be borne in mind that under Section 12 of the Federal Home Loan Bank Act a federal home loan bank is a body corporate with power to make contracts and hold and dispose of property. *Its powers are to be exercised and enjoyed subject to the approval of the Board.*

With this background in mind, let us see just how these orders stand scrutiny, especially when viewed in the light of the charges set forth in the Los Angeles complaint. We have already commented upon the failure of the Commissioner to make the *finding* prerequisite to a valid liquidation or reorganization pursuant to Section 26 of the Act (12 U. S. C., Sec. 1446).

Section 26 (1446) reads as follows:

> "§1446. Liquidation or Reorganization; Acquisition of Assets by Other Banks; Assumption of Liabilities.
>
> "Whenever the board finds that the efficient and economical accomplishment of the purposes of this

chapter will be aided by such action, and in accordance with such rules, regulations, and orders as the board may prescribe, any Federal Home Loan Bank may be liquidated or reorganized, and its stock paid off and retired in whole or in part in connection therewith after paying or making provision for the payment of its liabilities. In the case of any such liquidation or reorganization, any other Federal Home Loan Bank may, with the approval of the board, acquire assets of any such liquidated or reorganized bank and assume liabilities thereof, in whole or in part." July 22, 1932, c. 522, §26, 47 Stat. 740.

(1) *"May be liquidated or reorganized."*

The use of the disjunctive "or" in this clause of Section 26 will be noted.

As against this power to liquidate *or* reorganize, the Commissioner, by simultaneous action evidenced by Orders Nos. 5082, 5083 and 5084, purported to (a) liquidate *and* (b) reorganize *and* (c) dissolve the Los Angeles Bank *and* (d) transfer all of its assets, wholly without consideration, to the Portland-San Francisco Bank; and all of this without any action whatever by the directors or shareholders of either the Los Angeles or the Portland Bank. [20 R. 9478-9.]

These activities were wholly without legal justification or excuse.

In the first place, this was not a liquidation. There was no pretense of paying off such creditors as the bank may have had or of winding up its affairs. [20 R. 9477-8.] A mere transfer of assets, with or without consideration, is not a liquidation.

Buck v. Kleiber Motor Co. (9 Cir.), 98 F. 2d 903.

In the second place, the transaction was not a reorganization. The Los Angeles Bank was not reorganized, for the aim of the three orders was only to encompass its complete destruction. And again, a mere transfer of assets, with or without a consideration, is not a "reorganization," any more than it is a "liquidation." Obviously it is either a sale (if there be a consideration) or, as was the case here, a *gift* (made in this case by one having no power of disposition).

Compare:

LeTulle v. Schofield, 308 U. S. 415;

Commissioner v. Kitselman (7 Cir.), 89 F. 2d 458, 460;

United Light & Power Co. v. Commissioner (7 Cir.), 105 F. 2d 866, 877;

National Surety Co. v. Sand Springs State Bank (Okla.), 177 Pac. 574, 576.

In the third place, as we have indicated above, the Commissioner had no power of disposition over the assets of

the Los Angeles Bank, either by way of sale, gift or otherwise, to the exclusion of corporate action by the bank itself.

Under Section 12 of the Act (12 U. S. C., Sec. 1432),[8] as we have seen, full corporate powers are vested in the home loan banks, subject only to the *approval* of the Commissioner (Board) in specified particulars not here material. *It was thus the bank, as a corporation, and not the Commissioner, which had the power to hold or dispose of its property.*

The necessary conclusion is that the Commissioner did not "liquidate," nor did he "recognize." What he did was to give away, to another corporate entity, assets over which he had no power of disposition; and this he could not lawfully do either under Section 26 or any other provision of the Act.

(2) *"And its stock paid off and retired in whole or in part in connection therewith."*

It is undisputed that none of the stock of the Los Angeles Bank was either paid off or retired. In lieu of this, Order No. 5082 attempted by *fiat* and without the knowledge or consent of any of the Los Angeles Bank stockholders to make the latter shareholders of the Portland-San Francisco Bank. Such action was wholly without warrant or authority in law besides amounting to a clear violation of the intent and purpose of Section 26.

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[8]Section 12 (1432) is set forth in the appendix hereto.

(3) *"After paying or making provision for the payment of its liabilities."*

The liabilities of the Los Angeles Bank were not paid off nor was any valid provision made for their payment. Order No. 5082 purported to provide that the liabilities and obligations of the Los Angeles Bank "are to be" assumed by the Portland Bank; and the same "are hereby declared to be and become the liabilities and obligations of" the Portland Bank. The attempt of the Commissioner thus to force such liabilities and obligations on the Portland Bank was a clear encroachment upon the powers of that institution to enter into contracts as provided in Section 12 of the Act; all of which was to the prejudice of the creditors and members of the Los Angeles Bank.

(4) *"Any other Federal Home Loan Bank may with the approval of the board acquire assets of any such liquidated or reorganized bank."*

Here, again, it is undisputed that the Portland Bank did not "acquire"; the assets were forced upon it without any affirmative action being taken by its own management. For the same reason, the Commissioner did not "approve"; he was the actor in derogation of the powers of the Portland Bank under Section 12.

(5) *"And assume liabilities thereof in whole or in part."*

Portland Bank assumed nothing; the liabilities, like the assets, were purportedly forced upon it in derogation of its own corporate powers. An assumption of liabilities, of course, envisages a voluntary contractual arrangement for the benefit of creditors or others having an interest in the assets transferred. Here there was no contract

whatever; and any creditor of the Los Angeles Bank prior to seizure would have been powerless to enforce his demands had the Portland Bank chosen to resist them.

In addition to the foregoing, the attempt to dissolve the Los Angeles Bank even aside from the other effects of the orders, necessarily operated as a deprivation of the property of the Los Angeles Bank and its member associations without due process of law.

Section 25 of the Act (12 U. S. C., Sec. 1445) provides that each Federal Home Loan Bank shall have succession until dissolved by the Board (Commissioner) "under this Chapter" or by further Act of Congress. Reference to Section 12 reveals that a dissolution operates to deprive the dissolved bank of the powers, among others, to make contracts and to own, hold and dispose of property. In this case, it is admitted by the Portland Bank that at the time of the seizure Los Angeles Bank owned in its own right or was entitled to the possession of assets and properties owned by its member-shareholders of a total value in excess of $45,000,000. The effect of the "dissolution" was by administrative ukase and without notice, hearing or opportunity to be heard, to strip the Los Angeles Bank of all of these assets and place them in the possession of the Portland Bank. In the case of the member-shareholders of the Los Angeles Bank the effect was to strip them of their membership and shareholder status in the Los Angeles Bank, to thrust upon them, without their consent, membership in the Portland-San Francisco Bank and turn over their assets in the possession of the Los Angeles Bank either as collateral or on deposit to the

Portland-San Francisco Bank. Such activities constituted a clear deprivation of property without due process of law both as to the Los Angeles Bank and its members.

Compare:

Scott v. Donohue, 93 Cal. App. 126, 129-130;

Knights, etc., Inc. v. Francis, 79 Cal. App. 383, 385-386.

> "The historic phrase 'a government of laws and not of men' epitomizes the distinguishing character of our political society. When John Adams put that phrase into the Massachusetts Declaration of Rights he was not indulging in a rhetorical flourish. He was expressing the aim of those who, with him, framed the Declaration of Independence and founded the Republic. 'A government of laws and not of men' was the rejection in positive terms of rule by fiat, whether by the fiat of governmental or private power." (Mr. Justice Frankfurter, concurring in *United States v. United Mine Workers,* 330 U. S. 258, 307-8.)

In addition to the foregoing shortcomings of the orders on their face, the complaint in the Los Angeles case, as we have seen, alleges facts which, if true, would establish that the seizure of March 29, 1946, was unlawful, arbitrary and punitive and would hence overcome the disputable presumption of official rectitude upon which appellants seem to rely in this regard.

VII.

The Injunctive Order Appealed From Was a Proper Exercise of the Court's Equity Powers in Protecting Its Jurisdiction.

The distinction between general and special appearances has disappeared from the federal practice. See

E. G. Bowles v. Underwood Corp., 5 F. R. D. 25;
Blank v. Bitker, 7 Cir., 135 F. 2d 962, 966.

Although defendant Fahey and the Federal Home Loan Bank Board objected to the jurisdiction of the District Court over them at the outset, there are numerous instances in which such defendants have not only acquiesced in but availed themselves of the court's jurisdiction and power. These instances undoubtedly will be detailed by the Mallonee appellees in their brief. We will not duplicate their discussion. The threatened hearing by the Board would have concerned many issues in dispute between the Board and the Long Beach Association, which were and are before the court for adjudication. Having these facts in mind, the court properly acted to protect and preserve its jurisdiction by enjoining the threatened Board hearing. The court expressly so found [18 R. 8256], and the finding is unassailable. This exercise of the court's equitable powers was valid and reasonable in the circumstances of the case, to prevent its jurisdiction from being rendered futile by action of the Board. The court could have pursued a more drastic course (such as striking the answer of the Home Loan Bank Board if the hearing had been conducted in face of the court's jurisdiction), but it prop-

erly chose this more lenient remedy. The propriety of orders of the nature indicated is sustained by cases such as the following:

Kline v. Burke Construction Company, 260 U. S. 226, 229;

Doyne v. Saettele, 8 Cir., 112 F. 2d 155, 161;

See:

Long v. Stites, 6 Cir., 63 F. 2d 855, *cert. den.,* 290 U. S. 640.

Conclusion.

It is respectfully urged that the attacks of appellants against the jurisdiction below are without merit and that the order appealed from should be affirmed.

Respectfully submitted,

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APPENDIX.

JUDICIAL CODE, § 57, 28 U. S. C. A. § 118.

(As the same stood at the commencement of the Los Angeles action.)

§ 118. When in any suit commenced in any district court of the United States to enforce any legal or equitable lien upon or claim to, or to remove any incumbrance or lien or cloud upon the title to real or personal property within the district where such suit is brought, one or more of the defendants therein shall not be an inhabitant of or found within the said district, or shall not voluntarily appear thereto, it shall be lawful for the court to make an order directing such absent defendant or defendants to appear, plead, answer, or demur by a day certain to be designated, which order shall be served on such absent defendant or defendants, if practicable, wherever found, and also upon the person or persons in possession or charge of said property, if any there be; or where such personal service upon such absent defendant or defendants is not practicable, such order shall be published in such manner as the court may direct, not less than once a week for six consecutive weeks. In case such absent defendant shall not appear, plead, answer, or demur within the time so limited, or within some further time, to be allowed by the court, in its discretion, and upon proof of the service or publication of said order and of the performance of the directions contained in the same, it shall be lawful for the court to entertain jurisdiction, and proceed to the hearing and ad-

judication of such suit in the same manner as if such absent defendant had been served with process within the said district; but said adjudication shall, as regards said absent defendant or defendants without appearance, affect only the property which shall have been the subject of the suit and under the jurisdiction of the court therein, within such district; and when a part of the said real or personal property against which such proceedings shall be taken shall be within another district, but within the same State, such suit may be brought in either district in said State.

FEDERAL HOME LOAN ACT, § 12 (12 U. S. C. § 1432).

§ 1432. INCORPORATION OF BANKS; CORPORATE POWERS.

The directors of each Federal Home Loan Bank shall, in accordance with such rules and regulations as the board may prescribe, make and file with the board at the earliest practicable date after the establishment of such bank, an organization certificate which shall contain such information as the board may require. Upon the making and filing of such organization certificate with the board, such bank shall become, as of the date of the execution of its organization certificate, a body corporate, and as such and in its name as designated by the board it shall have power to adopt, alter, and use a corporate seal; to make contracts; to purchase or lease and hold or dispose of such real estate as may be necessary or convenient for the transaction of its business, but no bank building shall be bought or erected to house any such bank, nor shall any such bank make any lease for such purpose which has a term of more

than ten years; to sue and be sued, to complain and to defend, in any court of competent jurisdiction, State or Federal; to select, employ, and fix the compensation of such officers, employees, attorneys, and agents as shall be necessary for the transaction of its business, subject to the approval of the board; to define their duties, require bonds of them and fix the penalties thereof, and to dismiss at pleasure such officers, employees, attorneys, and agents; and, by its board of directors, to prescribe, amend, and repeal by-laws, rules and regulations governing the manner in which its affairs may be administered; and the powers granted to it by law may be exercised and enjoyed subject to the approval of the board. The president of a Federal Home Loan Bank may also be a member of the board of directors thereof, but no other officer, employee, attorney, or agent of such bank, who receives compensation, may be a member of the board of directors. Each such bank shall have all such incidental powers, not inconsistent with the provisions of this chapter, as are customary and usual in corporations generally. July 22, 1932, c. 522, §12, 47 Stat. 735.